RECENT CASES

ADJOINING LANDOWNERS—LATERAL SUPPORT—DAMAGES.—ORR v. DAYTON & M. TRACTION CO., 96 N. E. (IND.), 462.—*Held,* that the damages recoverable for the removal of the lateral support from land is the depreciation in the value of the land; such damages being recoverable irrespective of negligence.

The right to the lateral support of one's land in its natural condition is universally conceded. *Trowbridge v. True,* 52 Conn., 190; *Cabot v. Kingman,* 166 Mass., 403; *Farrand v. Marshall,* 19 Barb. (N. Y.), 380. However, most Courts hold that no action lies for an injury to the right of support until actual damage has occurred, the actionable wrong not being the excavation, but the act of allowing the other's land to fall. *Bonomi v. Backhouse,* El. Bl. & El., 622; *Schultz v. Bower,* 57 Minn., 493; *Smith v. Seattle,* 18 Wash., 484. Some Courts hold that the measure for damages for the loss suffered is the cost of restoring the same to as good a condition as it was before the excavation was made. *Stimmel v. Brown,* 7 Houst., (Del.), 219. Other Courts hold that prospective damages may be granted, the object being to consider the possible future damage that will probably result from the excavation. *Williams v. Missouri Furnace Co.,* 13 Mo. App., 70; *McGowan v. Bailey,* 146 Pa., 572; *Jones v. Seattle,* 23 Wash., 753. In accord with the principal case, the measure of damages as recognized by most Courts is the diminution in market value of the injured property. *Schroeder v. Joliet,* 189 Ill., 48; *Moellering v. Evans,* 121 Ind., 195; *McGuire v. Grant,* 25 N. J. L., 356. And, moreover, the right to damages is maintainable whether or not there was any negligence. *Foley v. Wyeth,* 2 Allen (Mass.), 131; *Ulrich v. Dakota L. & T. Co.,* 2 S. D., 285. As this applies only to land in its natural state, it does not apply to lands burdened with buildings, and to recover for damage done to such buildings by the removal of lateral support, it is necessary to show negligence. *Gilmore v. Driscoll,* 122 Mass., 199.

CONTRACTS—LEGALITY—RESTRAINT OF TRADE.—SMITH v. WEBB, 50 SOUTHERN, 913, ALABAMA.—*Held,* that an agreement by a vendor of a business not to engage in a similar business in opposition to the vendee is not void as being in restraint of trade, although not limited as to time of duration.

The weight of American authority is to the effect that agreements in restraint of trade are valid if they are partial in their operation, based upon valuable consideration, and reasonable and unoppressive in their conditions. *Holmes v. Martin,* 10 Ga., 503; *Grasselli v. Lowden,* 11 Ohio, 349; *Booth & Co. v. Siebold,* 74 N. Y. S., 776. Thus where contracts are limited as to time and place they will be deemed valid; *Perkins v. Lyman,* 9 Mass., 522; *Perkins v. Clay,* 54 N. H., 518; but even where limited as

to time and place contracts will be deemed void as in restraint of trade if conditions are such as will affect monopoly, stifle competition, or otherwise operate against public policy. *Western Wooden Ware Asso. v. Starkey,* 84 Mich., 76. Restriction as to place has been held in the United States Courts not to mean within State boundaries; *Oregon Steam Navigation Co. v. Winsor,* 87 U. S., 64; although the general rule is that restriction as to an entire State is void. *Consumers Oil Co. v. Nunnemaker,* 142 Ind., 560; *Taylor v. Blanchard,* 95 Mass., 370. Agreements limiting as to time and unlimited as to place are held valid if the conditions are such as warrant such clauses, so that the party from whom the consideration moves will not be prejudiced. *Callahan v. Donnelly,* 45 Cal., 152. Where the contract is unlimited or indefinite as to time it will not be held invalid if limited as to location; *Cook v. Johnson,* 47 Conn., 175; *Smith v.* Brown, 164 Mass., 584; but where there was no limitation as to the time in respect to a subject matter local in its nature, where limitation or nonlimitation as to extent of territory was necessary, it was held to be void as in restraint of trade and against public policy. *Ford v. Gregson,* 7 Mont., 89. Contracts in restraint of trade and unrestricted as to time and place are void. *Alger v. Thatcher,* 36 Mass. (19 Pick.), 51; *Albright v. Teas,* 37 N. J. Eq. (10 Stew.), 171.

CONTRACTS—PARTIES—PROMISE FOR BENEFIT OF THIRD PERSON.—SHEPPARD V. BRIDGES, ET AL., 74 S. E., (GA.), 245.—*Held,* that where one person for a valuable consideration, agrees with another to pay the debts of the latter, this alone does not authorize a creditor of the promisee to bring an action at law against the promisor to recover the debt.

The English rule is that a stranger to the consideration can maintain no action upon a contract; *Crow v. Rogers,* 1 Stra., 592; *Price v. Easton,* 4 B. & Ad., 433; and there is no exception made even in the case of parties closely related. *Gandy v. Gandy,* 30 Ch. Div., 57. Early Massachusetts cases opposed the English doctrine; *Felton v. Dickenson,* 10 Mass., 287; but later the English rule was adopted. *Mellon v. Whipple,* 1 Gray (Mass.), 317; *Marston v. Biglow,* 150 Mass., 45. A few other States favor the theory of the English decisions. *Butterfield v. Hartshorn,* 7 N. H., 345; *Crampton v. Ballard,* 10 Ver., 251. The New York Courts. however, early maintained the right of a third person to sue on the contract, and this is the present weight of authority in this country. *Mason v. Hall,* 30 Ala., 599; *Lawrence v. Fox,* 20 N. Y., 268. But even these Courts hold such third person must have some legal or equitable interest in the performance of the contract. *Carter v. Darby,* 15 Ala., 696; *Lowe v. Turpie,* 147 Ind., 652. Virginia leaves the question still open. *Willard v. Worsham,* 76 Va., 392; *Jones v. Thomas,* 21 Gratt. (Va.), 101. And in Connecticut, Maryland, and Pennsylvania, though the general rule is there regarded as the English rule, still the exceptions to it are so numerous that in reality they rather follow the general American doctrine. *Meech v. Ensign,* 49 Conn., 191; *Seigman v. Hoffacker,* 57 Md., 321; *Merriman v. Moore,* 90 Pa. St., 78.

CONSTITUTIONAL LAW—CONSTRUCTION.—STATE V. MCCARTY, 59 SOUTH., 543 (ALA.).—*Held*, that a constitution must be interpreted so as to carry out the great principles of the government, and not be given any technical construction which will defeat them.

The terms *construction* and *interpretation* are used interchangeably in the principal case. Interpretation differs from construction in this: that interpretation is used for the purpose of ascertaining the true sense of any form of words, while construction involves the drawing of conclusions regarding subjects that are not always included in the direct expression. *Bloomer v. Todd,* 3 Wash. T., 612. In practice both terms are frequently used synonymously. *Bouvier Law Dict.* The law as laid down in the principal case does not consider the fundamental rules which govern the construction of a constitution. The purpose, in construing a constitutional provision, is to ascertain and give effect to the intent of the people in adopting it. *Hills v. Chicago,* 60 Ill., 86; *Miller v. Dunn,* 72 Cal., 465; *Newall v. People,* 7 N. Y., 97. The extremes of both a liberal and a strict construction are to be avoided. *Steamboat Co. v. Livingston,* 3 Cow. (N. Y.), 713; *State v. Ashley,* 1 Ark., 513. The words used are presumed to have been used in their ordinary and natural meaning. *Gibbons v. Ogden,* 9 Wheat. (U. S.), 1; *Little v. Van Evrea,* 49 N. Y., 281. The real intention, when once accurately ascertained, will prevail over the literal sense of the terms employed in the instrument. *District Tp. v. Dubuque,* 7 Iowa, 262. Where both a technical and a popular construction are possible the latter prevails. *Weill v. Kenfield,* 54 Cal., 111; *People v. N. Y. Cent. R. R. Co.,* 24 N. Y., 488. But where the words are borrowed from the common law they retain their fixed technical meaning. *Carpenter v. State,* 4 How. (Miss.), 166; *McGuinnes v. State,* 9 Humph. (Tenn.), 47.

CRIMINAL LAW—CONDUCT OF TRIAL—ABSENCE OF JUDGE.—HUGHES V. STATE, 149 S. W., 173 (TEX.).—*Held*, that the temporary absence of a judge from the court room during the trial is not ground for a reversal unless during his absence something occurs prejudicial to the accused. Davidson, P. J., *dissenting.*

The weight of American authority sustains the proposition that there can be no Court without a judge, and that it is his duty to be present during all stages of the trial; *People v. Blackburn,* 127 Cal., 248; *Turbesville v. State,* 56 Miss., 793; and that unless the parties consent to such act, absence will be ground for reversal. *Smith v. Sherwood,* 95 Wis., 558; *State v. Smith,* 49 Conn., 376. It has even been held that a judge must be visibly present at all times; *State v. Beuerman,* 59 Kan., 586; *People v. Tupper,* 122 Cal., 424; though there is some authority for the proposition that a judge may be out of sight but within hearing and so able to pass on any question that may arise. *Rowe v. People,* 26 Colo., 542; *State v. Porter,* 105 Iowa, 677. A judge, however, to avoid a reversal must always be present during the summing up of counsel. *Hayes v. State,* 58

Ga., 35; *Patin v. State*, 38 Neb., 862; *Brownlee v. Hewitt*, 1 Mo. App., 360. The case under discussion holding that prejudice during the absence of a judge must be shown in order to constitute error, is supported by a minority of authorities. *Baxter v. Ray*, 52 Iowa, 336. If counsel proceed with their arguments after the judge's departure, though prejudice be shown, no appeal will be allowed. *Oakley v. Aspinwall*, 3 N. Y., 547. Some States, also, adopt the view that if absence by the judge is not complained of at the time, a new trial will not be granted. *O'Shields v. State*, 81 Ga., 301; *Pritchett v. State*, 92 Ga., 301. The holding of the principal case, though probably not in accord with the present numerical weight of authority on this subject, is at least more in accord with common sense, and seems to lay down a better rule.

INTOXICATING LIQUORS—SALE WITHOUT LICENSE—BURDEN OF PROOF—SALT LAKE CITY v. ROBINSON, 125 PAC., 657 (UTAH).—*Held*, that the burden is on one charged with selling intoxicants without a license to show that he had a license to sell.

It is held in Kansas that where a defendant is prosecuted for selling intoxicating liquor without a license the burden of proving a want of license is upon the prosecution. *State v. Kuhuke*, 26 Kan., 405; *State v. Nye*, 32 Kan., 201. In Wisconsin the doctrine is that, in such prosecution, the State must produce some presumptive evidence that the defendant had no license before he can be called upon to prove the contrary. *Heplar v. State*, 58 Wis., 46; *Mehan v. State*, 7 Wis., 670. In two early cases the Supreme Court of Massachusetts held that the prosecution must prove that the accused had no license, and no presumption that he had none could arise from the act of selling. *Com. v. Livermore*, 2 Allen (Mass.), 292; *Com. v. Thurlow*, 24 Pick. (Mass.), 374. Thereupon the legislature passed an act that in all prosecutions for liquor selling the legal presumption should be that the defendant had not been licensed, thus reversing what had been held to be the Common Law rulé in these two cases. This was held to be within the powers of the legislature. *Com. v. Kelly*, 10 Cush., 69. An early case in North Carolina also held that the allegation of the want of a license in a bill of indictment for selling spirituous liquor must be proved on the part of the State. *State v. Evans*, 5 Jones' Rep. (N. C.), 250. But the generally established rule is stated by the main case. *Com. v. Belou*, 115 Mass., 139; *Jefferson v. People*, 101 N. Y., 19; *Lucio v. State*, 35 Tex. Crim., 320. Of course, the word *burden*, as used in the main case, must be understood to mean merely the burden of proceeding; otherwise it would be requiring the accused to establish his innocence, which would be contrary to the notion of the Criminal Law which regards him as innocent until proved guilty.

MANDAMUS—OFFICERS SUBJECT TO MANDAMUS—GENERAL COUNCIL OF CITY.—CITY OF PEDUCAH v. BOARD OF EDUCATION OF CITY OF PEDUCAH, 145 S. W., 1 (KY.).—*Held*, that where it is proper for the general council to

apportion revenues, and include in their apportionment the amount to be applied to school purposes, as provided by statute, any attempt to defeat the legal demands of the board of education, either by insufficient apportionment or by an insufficient levy, may be prevented by *mandamus.*

Municipal legislative bodies, like the superior legislative bodies of the State government, in the performance of purely legislative functions, are exempt from coercion by mandamus. *Kennedy v. Washington,* 3 Cranch (C. C.), 595; *Young v. Carey,* 80 Ill. App., 601. But mandamus lies to compel the proper authorities to perform their ministerial duties. *People v. Raymond,* 186 Ill., 407; *Polk v. James,* 68 Ga., 128. Thus mandamus lies to compel a city council to distribute and pay over the moneys apportioned for school purposes; *Hon v. State,* 89 Ind., 249; *Plainfield Bd. of Education v. Sheridan,* 45 N. J. L., 276; *Brown v. Nash,* 1 Wyo., 85; and to appropriate a sum of money for the maintenance of a public board when a statute makes it their duty to do so. *State v. Shakespeare,* 41 La. Ann., 156; *Perkins v. Slack,* 86 Pa. St., 270. But where the authorities are vested with exclusive discretionary powers in the disbursement and distribution of school funds, or in appropriating money for school purposes mandamus does not lie to compel their discretion. *Newark v. Newark Bd. of Education,* 30 N. J. L., 374. So also the writ will not lie to compel an appropriation for school purposes unless the authorities having the power to make the requisition therefor do so in the proper manner and at the proper time. *Com. v. Pittsburg,* 209 Pa. St., 333.

MUNICIPAL CORPORATIONS—POWERS OF COUNCIL—RESOLUTION.—LEVY ET AL. V. CITY OF ELIZABETH, 80 ATL., 498 (N. J.).—*Held,* that a municipal charter conferring on the council power to "make, establish, publish and modify, amend or repeal ordinances, rules, regulations, and by-laws" for certain specified purposes, gives no power to the council to act in that regard by resolution, but only by ordinance.

Legislative and permanent acts regulating the affairs of a municipal corporation should be in the form of ordinances and not in the form of resolutions. *Cascaden v. Waterloo,* 106 Iowa, 673; *Central v. Sears,* 2 Colo., 588. A resolution is sufficient for the promulgation of ministerial acts. *Blanchard v. Bissell,* 11 Ohio St., 96. An ordinance may, however, be in the form of a resolution and will generally be valid if enacted with all the formalities which are required by law for the enactment of ordinances. *Sower v. Philadelphia,* 35 Pa. St., 231; *Alma v. Guaranty Savings Bank,* 19 U. S. App., 622. In such cases, however, it has been held that there must be an affirmative showing that the concomitant formalities of an ordinance, as regards its approval and subsequent publication, were observed to establish the validity of the resolution as an ordinance. *Wheeler v. City of Poplar Bluff,* 149 Mo., 36. But where the charter confers upon a city council power to regulate by ordinance, a like power to regulate by resolution is not to be implied, and such resolutions will be null and void.

Chicago, etc., R. Co. v. Chicago, 174 Ill., 439; *Mills v. City of San Antonio,* 65 S. W., 1121; *City of Nevada v. Eddy,* 123 Mo., 546. Nor can an ordinance be repealed or modified by resolution, unless the substance of the ordinance is such that it originally might have been given valid effect if put in the form of a resolution. *San Antonio v. Micklejohn,* 89 Tex., 79. The reasoning of these cases, though not directly touching upon the identical proposition of the principal case, tends to confirm the soundness of its holding, and makes more plain the tendency of the Courts to regard proceeding by resolution on the part of a city council as ineffectual when the charter can be understood in any reasonable way as calling for proceeding by ordinance.

OFFICERS—APPOINTMENT—REMOVAL—POWER OF GOVERNOR.—STATE V. RHAME, 75 S. E., 881 (S. C.).—*Held,* that the power of removal from office by the Governor is not incident to the power of appointment where the term of office is fixed by statute. Watts, J., and Gage, Cir. J., *dissenting.*

It may be stated generally, that where the power of appointment is conferred in general terms and without restriction, the power of removal, in the discretion and at the will of the appointing power, is implied and always exists unless restrained and limited by some provision of law. *People v. Robb,* 126 N. Y., 180; *Houseman v. Com.,* 100 Pa., 222; *Town of Davis v. Filler,* 47 W. Va., 413. By other Courts the proposition is stated that where the tenure of office is not fixed by law, and no other provision is made for removals either by the Constitution or by statute, "it is a sound and necessary rule to consider the power of removal as incident to the power of appointment." *Ex parte Hennan,* 13 Peters (U. S.), 230; *Patton v Vaughan,* 30 Ark., 211; *State v. Dahl,* 140 Wis., 301. The power of arbitrary removal is to be limited to these circumstances, however, and if the tenure is fixed by law, the appointing power cannot arbitrarily remove him. *Collins v. Tracy,* 36 Tex., 546; *People v. Hill,* 7 Cal., 97; *State v. Chatburn,* 63 Ia., 659. A general power to remove cannot be implied as a consequence of the power to appoint where the statute gives express authority to remove on certain specific grounds. *People v. Treas. of Ingham County,* 36 Mich., 416. Nor can it be implied where the power of appointment by one person is dependent on the precedent or concurrent actions of other persons. *Carr v. State,* 111 Ind., 101. The power of amotion from office is not a judicial but an administrative power although it be exercised in a judicial manner. *State v. Dahl,* 140 Wis., 301. It may be vested elsewhere than in the appointing power; *People v. McAllister,* 10 Utah, 357; and it may be vested in the Governor alone although the appointment is made by and with the consent of the Senate. *Wilcox v. People,* 90 Ill., 196. It is a common provision of State governments that the Governor shall have the power to remove for cause not only appointive but elective officers, and this is clearly within the authority of the sovereign power. *People v. Whitlock,* 92 N. Y., 191. In the case of the President of the United States it has been held that by reason of the construction placed by

Congress upon the Constitution, he is to be regarded as possessing the power to remove an officer appointed by him and confirmed by the Senate, who by law has a fixed term. *Parson v. United States,* 167 U. S., 324. And a similar rule has been announced as to the power of the Governor under certain State Constitutions. *Harman v. Harwood,* 58 Md., 1. Yet the holding of the principal case is supported by the clear weight of authority; *People v. Jewett,* 6 Cal., 291; *Bruce v. Matlock,* 86 Ark., 555; *Territory v. Ashenfelter,* 5 N. M., 85; despite the fact that we have the anomalous situation of (in the words of one of the dissenting judges) "the created being greater than the creator".

RAPE—EVIDENCE—CHARACTER OF FEMALE.—STORY V. STATE, 59 SOU., 480 (ALA.).—*Held,* that in prosecutions for rape, where nonconsent is an element of the offense, and in which the chastity of the woman may be brought into question, the character of the prosecutrix may be impeached, but by evidence of her reputation in that respect only, and not by proof of specific acts.

The weight of American authority is in accord with the case under discussion and holds that want of chastity on the part of the prosecutrix in an action of rape must be shown by general reputation and not by proof of specific acts. *Pleasant v. State,* 15 Ark., 624; *Comm. v. Regan,* 105 Mass., 593. And evidence of such reputation must be confined to the time prior to the alleged rape. *State v. McDonough,* 104 Iowa, 6; *State v. Forshener,* 43 N. H., 89. There is, however, this exception to the general rule, that individual acts with the defendant, prior to the alleged crime, may be proved, as it tends to show consent; *People v. Mathews,* 139 Cal., 527; *State v. Cook,* 65 Iowa, 560; and that general immoral character and habits of the prosecutrix may be produced in evidence to the extent of showing that she was a common prostitute. *Brown v. State,* 72 Miss., 997; *Titus v. State,* 7 Baxt. (Tenn.), 132. In some States, however, it is held that the question of character may be affected by specific acts of intercourse, if proven, though committed with other persons than the defendant; *People v. Benson,* 6 Cal., 221; *Brown v. Comm.,* 102 Ky., 227 (overruling, 93 Ky., 578); *People v. Abbot,* 19 Wend. N. Y., 192; *State v. Patterson,* 88 Mo., 88 (overruling, *St. v. Brassfield,* 81 Mo., 151); and that the prosecutrix may be compelled to answer on cross-examination as to whether she had intercourse with another at or about or before the time of the act alleged. *State v. Hollenbeck,* 67 Vt., 34. It seems a harsh rule to allow evidence of past immoral acts to be introduced in such a case, without taking circumstances into consideration. If a woman should reform and become of such good character that her later seduction would furnish grounds for an action for rape, she then being chaste in contemplation of law, *State v. Thornton,* 108 Mo., 640; *Patterson v. Hayden,* 18 Iowa, 372; evidence of her immoral acts before her reformation should not be admitted. The principal case lays down the better and more generally accepted rule on this subject.